Discount Methodology

The Joint Board recommends that the Commission adopt a percentage discount mechanism, adjusted for schools and libraries that are defined as economically disadvantaged and those schools and libraries in high cost areas. The Joint Board goes on to recommend that the Commission adopt a matrix that provides discounts from 20 percent to 90 percent for telecommunications services, internet access and internal connections, with the range of discounts correlated to indicators of economic disadvantage and high cost for schools and libraries. Recommended Decision at Paragraph 547.

The PUCO concurs with the discount methodology proposed by the Joint Board and considers it flexible and accommodating to the telecommunications technology programs in place in the state. In particular the discount methodology will provide schools and libraries in Ohio support for long-term recurring costs for what are now relatively high-cost advanced telecommunications services related to internet access and network two-way video applications. The discount system for low-wealth and high cost schools will enhance the ability for all schools in the state to have more equal opportunity to access advanced technologies.

The PUCO agrees that the national school lunch program is appropriate criterion for identifying low-income districts typically in urban areas, but notes that it may not be as appropriate for identifying low-wealth/high cost districts which are more likely to be rural. A combination of property valuation for low-wealth district determination, and geographic distance from switch or wire center for high cost determination may be more appropriate for the more rural school districts. (See comments of the Ohio Department of Education, Office of Information, Learning and Technology Services - SchoolNet, for an elaboration of the determination of low wealth and high cost schools.)

Funding for Schools and Libraries

The Joint Board recommends that universal support mechanisms for schools and libraries be funded by assessing both the interstate and intrastate revenues of providers of interstate telecommunications services. Recommended Decision at Paragraph 817. In addition, the Joint Board recommends that the FCC set an annual cap on spending of $2.25 billion per year. Recommended Decision at Paragraph 556.

The PUCO agrees that universal support mechanism for schools and libraries be funded by assessing both intrastate and interstate revenues of providers of interstate telecommunications services.

However, the PUCO is interested in the methodology for managing especially the intrastate portion of the fund. The PUCO recommends that the FCC give thought to a mechanism that provides for some state responsibility and/or oversight for the collection and distribution of the intrastate revenues to be assessed for support mechanisms for schools and libraries.

In particular, the PUCO suggests that the intrastate revenues targeted for the education and library support fund be collected and administered by state authorities. This policy would allow the states to maximize their expertise and local knowledge of school and library needs within each state and provide a relatively know quantity of funds to support the attainment of advanced telecommunications technologies. The interstate portion of the schools and libraries fund would be used to enhance and augment intrastate funds available to each state as needed.

The PUCO recommends that the interstate portion of the schools and libraries fund be apportioned in the form of block grants to each state. A block grant approach has the benefit of being predictable, one of the underlying principles of Section 254. The formula for determining block grants to the states should consist of a baseline relative to the proportion of revenues contributed by each state, modified by a measure of low-wealth determination. The PUCO suggests that low-wealth determination for schools in each state be based on criteria established by state education agencies in conjunction with the FCC.

ADMINISTRATION

Funding Base

(Section XIII of the Recommended Decision)

The Joint Board recommended that universal service support mechanisms for schools, libraries, and rural health care providers be funded by assessing both the intrastate and interstate revenues of providers of interstate telecommunications services. Recommended Decision at Paragraph 817. The Joint Board makes no recommendation concerning the appropriate funding base for the modified high cost and low-income assistance programs, but requests that the Commission seek additional information and parties' comment, particularly the states, regarding the assessment method for these programs. Recommended Decision at Paragraph 817. The PUCO generally questions the FCC's legal authority to utilize revenues associated with intrastate services in funding the federal universal service programs. But the PUCO accepts the Joint Board's proposal regarding the dual funding of schools and libraries and rural health care providers, subject to some suggestions outlined in these comments. Regarding the dual funding of high cost and low-income, the PUCO offers constructive suggestions while reserving the right to challenge the decision if the FCC funds those programs with intrastate revenues.

It is not difficult to understand why some members of the Joint Board and the FCC appear to endorse dual federal/state funding of high cost and low-income universal service programs. There are laudable public policy goals that support a national, uniform program for universal service where low cost states like Ohio effectively fund other higher cost states relative to universal service. As a practical matter, enlisting intrastate revenues will substantially expand the funding base available for the FCC's universal service mechanism.

The PUCO's substantive comments reflect Ohio's suggestions relative to the Joint Board's existing recommendations. Perhaps even more significant, however, are Ohio's concerns regarding the unanswered questions regarding the total size of the fund and operation of the unspecified proxy model and benchmark rate to be chosen. The PUCO finds it difficult to endorse any funding mechanism given these unknowns. Rather than buy a "pig in a poke," the PUCO will offer some constructive suggestions now and will articulate and reserve its legal concerns with a funding base that includes intrastate revenue. Whatever the FCC's approach is relative to funding, it needs to ensure that state authority over universal service is meaningfully preserved, as was expressly desired by Section 254(f) of the 1996 Act and was affirmatively stated in Congress' Joint Explanatory Statement. Joint Explanatory Statement at 132.

An examination of the 1996 Act shows that the FCC does not have clear authority to utilize intrastate revenue to fund its universal service program. First and foremost, Section 254 was crafted to reinforce the traditional dichotomy between interstate and intrastate services that is found throughout the 1996 Act. Section 254 unequivocally provides that interstate service providers shall contribute to the universal service mechanism established by the FCC, and that intrastate service providers shall contribute to the universal service mechanisms established by the states. 47 U.S.C. Section 254(d), (f).

This requirement alone strongly implies that the revenues available to fund the FCC's universal service mechanism are limited to those revenues associated with interstate services. Courts have concluded in this context that jurisdiction over revenue associated with a service is limited by jurisdiction over the underlying service. *AT&T Communications of the Mountain States, Inc. v. Pub. Serv. Comm.*, 625 F. Supp. 1204 (D. Wyo. 1985) (and cases cited therein). The *AT&T* Court's straightforward approach certainly makes sense and prevents one jurisdiction from indirectly infringing upon the other party's jurisdiction.

Without explicit authority or Congressional directive, it is inconsistent with the entire history of the Communications Act's jurisdictional separation to suggest that the FCC can simply appropriate intrastate revenue for the purpose of establishing federal rates or charges as long as it limits those charges to interstate carriers who also provide intrastate services. Section 152(b) of the Communications Act prevents that result. Except as to certain specified provisions, Section 152(b) provides that "nothing in this Act shall be construed to apply or to give the Commission jurisdiction with respect to charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service." Hence, except for certain specified sections (not including Section 254), the extent of the FCC's jurisdiction is limited to interstate services.

It defies reality to suggest that regulation of revenues associated with intrastate service is anything other than indirect regulation of intrastate service rates. It is axiomatic that the current intrastate rates have been set by states without regard to this new federal proposal on universal service (i.e., based on cost or alternative pricing authority). Accordingly, the federal appropriation of some of the revenues generated by those state-approved rates directly and substantially impacts the intrastate rate authority of states. All else being equal, there is a direct, upward pressure on intrastate rates if intrastate revenues are drawn upon by the FCC's universal service mechanism. Stated another way, the states' jurisdiction over intrastate rates, as expressly preserved by Sections 152(b), will be directly impacted by the "loss" of those intrastate revenues.

The enlistment of intrastate revenues, at a minimum, amounts to regulation "in connection with intrastate services" by the FCC, which is also prohibited by Section 152(b). It is simply not legally sufficient for the FCC to rely upon broad policy arguments to conclude that it has the authority to preempt states in this area. *Louisiana Pub. Serv. Comm. v. FCC,* 476 US. 355, 374-375 (1986) (the FCC cannot take preemptive action to advance broad federal policy where the effect is to disregard 47 U.S.C. Section 152(b)'s express jurisdictional limitation). To the same end, Section 601(c) of the 1996 Act prohibits implicit preemption of state authority where Congress failed to explicitly preempt the states.

Congress also provided directly within Section 254 (K) that "[t]he Commission with respect to interstate services, and the States, with respect to intrastate services, shall establish any necessary *cost allocation rules,* accounting safeguards, and guidelines to ensure that services included in the definition of universal service bear no more than a reasonable share of the joint and common costs of facilities used to provide those services." Here, Congress is clarifying that jurisdiction over certain services includes jurisdiction over the underlying cost and rate/revenue issues related to these services. Congress contemplated in this provision that costs may need to be allocated among services and, in that context, explicitly confirmed that the FCC should only address interstate services (and the costs and rate/revenue issues attached to those services) so that states can address intrastate services (and the costs and rate/revenue issues attached to those services). Congress consciously constructed the 1996 Act, including Section 254, to continue the dual regulatory system of the FCC regulating interstate services (including cost and rate/revenue issues) and the states regulating intrastate services (including cost and rate/revenue issues).

As a related matter, the Joint Board requests that parties comment on the ability to separately identify intrastate and interstate revenues in the evolving telecommunications market where services typically associated with particular jurisdictions are likely to be packaged together. Recommended Decision at Paragraph 822. Although that task may become more difficult, experience and reality show that it is not impossible and, in fact, will probably continue to be done independent of this universal service issue.

First, if a judicial interpretation of Section 254 shows confirms that Congress' intent was to require such separation or allocation of revenue, then that task will need to be performed even in an evolving telecommunications market. Second, it is unlikely that the FCC's Universal Service mechanism will provide for 100% recovery of the revenue shortfall between the benchmark and the proxy results. Currently, the CCLC and the End-User Common Line Charge (or subscriber line charge) are designed to recover a 25% allocation of the local loop costs to the interstate jurisdiction. Therefore, even if service packages are marketed that do not separate interstate or intrastate rates, a general allocator could still be used for jurisdictional purposes in the context of universal service. It currently is, and can continue to be, done in that simple, efficient manner. Third, jurisdictional revenue separation will occur independent of whether the FCC's universal service mechanism requires it. The Americans with Disabilities Act required revenue separation for assessment of funds for the Telecommunications Relay Service (TRS). 47 U.S.C. Section 225(d)(3)(B).[1] In

[1] In requiring cost separation for TRS, Congress used the abbreviated phrase "state jurisdiction" to compare the state recovery of intrastate costs from intrastate service customers to the FCC-mandated recovery of "costs caused by interstate telecommunications relay services from all subscribers for every interstate service." 47 U.S.C. Section 225(d)(3)(B). This is another indication that Congress generally believes that jurisdiction over the underlying services extends only to the rates and revenues associated directly with those services.

short, the inseverability issue alluded to in Paragraph 822 of the Recommended Decision is a "red herring."

If the FCC's ability to establish intrastate interconnection rates under Section 251 may be characterized as questionable (the United States Court of Appeals for the Eighth Circuit appears to believe that it is), the FCC's ability to appropriate intrastate revenues for universal service can be fairly characterized as highly questionable. That legal infirmity, coupled with the uncertain financial implications associated with the unresolved issues in this docket, compels the PUCO to qualify its endorsement of the dual funding base proposal on the outcome of this proceeding and to reserve its right to legally challenge the FCC's decision.

The PUCO notes that if the FCC determines that Section 254 provides it with the requisite authority to place assessments on intrastate revenues to fund interstate high cost funding programs (arguendo), the PUCO maintains that the FCC must place a reasonable cap on the level of such funding. In particular, the PUCO submits that this funding level should be limited to 40 percent of the overall revenue shortfall between proxy results and the benchmark rate. For example, if the difference between the benchmark and the results of the proxy model of a certain company in a specific service are is $10.00 per access line, the FCC under this scenario should limit federal high cost funding assistance to $4.00. The PUCO maintains that the level funding for the remainder of the shortfall should be determined by the individual states at the discretion of the individual states.

Additionally, if the FCC determines that Section 254 provides it with the requisite authority to place assessments on intrastate revenues to fund interstate high cost funding programs (and as discussed earlier in these comments, lifeline programs), the PUCO maintains that the FCC must adopt a *quid pro quo* approach to funding of such programs. That is, the FCC should also acknowledge that, if it is going to utilize intrastate revenues to fund federal programs, the states will also be able to place assessments on the revenues generated by interstate carriers providing intrastate services. This assessment, similar to the FCC's proposal, would be based on all revenues, both interstate and intrastate, originated and generated within the boundaries of the state.

CONCLUSION

In closing, the PUCO wishes to thank the FCC for the opportunity to file comments responding to the Joint Board's Recommended Decision.

On behalf of the
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